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# In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2050

UNITED STATES OF AMERICA, PETITIONER

*v.*

LUIS ANTONIO ORTIZ

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A)[1] is not yet reported. The opinion of the district court (Pet. App. 5A-41A) is reported at 368 F. Supp. 398.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 3A) was entered on June 19, 1974. The petition for a writ of certiorari was filed on July 19, 1974, and was granted on October 15, 1974. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

[1] This Court granted leave to dispense with the printing of a separate appendix. "Pet. App." refers to the appendix to the petition for a writ of certiorari.

## QUESTIONS PRESENTED

1. Whether this Court's decision in *Almeida-Sanchez* v. *United States*, 413 U.S. 266—which held that a warrantless "roving patrol" search of an automobile for concealed aliens, conducted by Border Patrol officers acting without probable cause to believe that the vehicle contained any aliens, violated the Fourth Amendment's proscription against unreasonable searches and seizures—should be extended to invalidate a similar search for aliens at a fixed Border Patrol checkpoint.

2. Whether, if *Almeida-Sanchez* should be so extended, the extension should apply to checkpoint searches conducted prior to the date of the Ninth Circuit's decision in *United States* v. *Bowen*, 500 F. 2d 960, in which that court, overruling a long line of its prior decisions, held for the first time that warrantless checkpoint searches not based upon probable cause are unlawful.

## STATUTE AND REGULATION INVOLVED

1. Section 287(a) of the Immigration and Nationality Act, 66 Stat. 233, 8 U.S.C. 1357(a), provides in pertinent part:

> Any officer or employee of the [Immigration and Naturalization] Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
>
> * * * * *
>
> (3) within a reasonable distance from any external boundary of the United States, to

board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; * * *.

2. 8 C.F.R. 287.1 provides in pertinent part:

(a)(2) *Reasonable distance.* The term "reasonable distance," as used in section 287(a)(3) of the Act, means within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the district director, or, so far as the power to board and search aircraft is concerned, any distance fixed pusuant to paragraph (b) of this section.

(b) *Reasonable distance; fixing by district directors.* In fixing distances not exceeding 100 air miles pursuant to paragraph (a) of this section, district directors shall take into consideration topography, confluence of arteries of transportation leading from external boundaries, density of population, possible inconvenience to the traveling public, types of conveyances used, and reliable information as to movements of persons effecting illegal entry into the United States: *Provided,* That whenever in the opinion of a district director a distance in his district of more than 100 air miles from any external boundary of the United States would because of unusual circumstances be reasonable, such district director shall forward a complete report with respect to the matter to

the Commissioner, who may, if he determines that such action is justified, declare such distance to be reasonable.

## STATEMENT

After a non-jury trial in the United States District Court for the Southern District of California, respondent was convicted on three counts of transporting aliens who were present in this country illegally, in violation of 8 U.S.C. 1324(a)(2). He was sentenced to concurrent terms of imprisonment for three years. Execution of all but six months of the sentence was suspended, however, and respondent was placed on probation for three years.

1. The facts are contained in a stipulation (Pet. App. 43A–45A) and in the district court's findings based upon that stipulation (*id.* at 47A–48A). On November 12, 1973, near Oceanside, California, respondent placed three Mexican aliens in the trunk of his automobile and drove them north along Interstate Route 5. Respondent knew that each of the aliens was present in this country illegally and that each had entered within the prior three years.

The vehicle was stopped at the permanent Border Patrol immigration checkpoint on Interstate Route 5 near San Clemente, California, about 62 miles from the Mexican border (*id.* at 24A). Border Patrol officers directed respondent's automobile to the secondary inspection area at the side of the road. The officers there opened the trunk of the car and found the three aliens concealed inside.

2. Prior to trial, respondent moved to suppress the evidence derived from the search of his automobile.

He claimed, relying on this Court's decision in *Almeida-Sanchez* v. *United States*, 413 U.S. 266, that the evidence was the product of an unreasonable search and seizure.

The district court had previously issued an *en banc* general order providing for a limited consolidation of the "large number of criminal cases now pending before this court which involve the question of the impact of the recent Supreme Court decision in *Almeida-Sanchez* v. *United States*" on the validity of "searches conducted at checkpoints operated by the U.S. Border Patrol."[2] The court believed that a consolidated evidentiary hearing would expedite the ultimate disposition of the cases, foster the uniform application of the relevant legal principles, and "facilitate the presentation, by all interested parties, of any pertinent information which might aid the court in its eventual determination" (App., *infra*, p. 59).

District Judge Schwartz, to whom the present case was initially assigned, ordered that it be consolidated for an evidentiary hearing with the other pending cases under the court's general order. The consolidated proceeding was assigned to District Judge Turrentine. After several days of hearing, at which respondent was represented by counsel, Judge Turrentine issued a comprehensive opinion (Pet. App. 5A–41A) containing detailed findings on the causes and consequences of the widespread illegal entry of aliens from Mexico, the difficult law enforcement problems confronting the Border Patrol in its efforts

[2] The order is reproduced as an appendix to this brief, *infra*, pp. 59–60.

to maintain an effective deterrent and to apprehend illegal entrants, the role of the Border Patrol's fixed immigration checkpoints in the overall law enforcement program, and the placement and operating characteristics of each of the checkpoints in the Southern District of California.[3]

[3] In his Memorandum in Opposition in this case, respondent argued (pp. 1-2) that Judge Turrentine's opinion and the record compiled in the consolidated proceeding are not properly before this Court as part of the record in this case, because they were not physically transmitted to the court of appeals by the district court as part of the clerk's record. Rule 10(a) of the Federal Rules of Appellate Procedure, however, provides that "[t]he original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries shall constitute the record on appeal in all cases." The rule makes no exceptions. Under Rule 11(f) the parties may stipulate "that designated parts of the record shall be retained in the district court * * *." But that rule also provides that "[t]he parts thus designated shall nevertheless be a part of the record on appeal for all purposes." The practice in the District Court for the Southern District of California is for counsel for each party to designate those portions of the record that should be physically transmitted to the court of appeals as part of the clerk's record. Where, as here, some items are not designated for physical transmission, the parties' written designation form amounts to a stipulation under Rule 11(f) that the items not designated shall be retained in the district court. Thus, while Judge Turrentine's opinion and the underlying transcripts and exhibits were not designated for transmission to the court of appeals in this case, Rule 11(f) makes clear that they are nevertheless "a part of the record on appeal for all purposes." It follows that they are part of the record for purposes of review by this Court on writ of certiorari.

Neither the clerk of the district court nor the clerk of the court of appeals has been able to locate the original copy of the transcript of the consolidated proceeding. We will therefore lodge with the Clerk of this Court our copy of the transcript. We have asked the clerk of the district court to transmit to

The court found that the San Clemente checkpoint "is the primary, or cornerstone, checkpoint maintained by the Border Patrol in this District" (*id.* at 25A), that "[o]ver 12,000 deportable aliens were apprehended there alone in fiscal year 1973" (*ibid.*), and that the checkpoint is located at "the point least burdensome to traffic" on Interstate Route 5 between San Diego and Los Angeles (*id.* at 26A).

The court considered it necessary, under the majority's opinion in *Almeida-Sanchez,* to determine with respect to each of the Border Patrol checkpoints in the district whether a warrantless vehicle search for aliens without probable cause could be justified as the "functional equivalent" of a border search. That determination, the court reasoned, rests on whether the search occurs at "the first effective point of entry" (*id.* at 34A), taking into account the intrusiveness of the search, its relationship to legitimate Border Patrol objectives, the geographic characteristics of the checkpoint, and the available manpower resources of the Border Patrol. The court held on the basis of these criteria that searches of vehicles for aliens at the San Clemente checkpoint are constitutionally permissible as the functional equivalent of border searches (*id.* at 35A).

Judge Turrentine did not, however, specifically rule on the individual validity of any of the searches that

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this Court, in connection with the petition for a writ of certiorari in *Baca* v. *United States*, No. 74-5307, the original exhibits introduced at the hearing. Counsel for respondent, John J. Cleary, Esquire, has agreed that this is the appropriate way to make the transcript and exhibits available to this Court.

had occurred in the 16 cases that were consolidated for the evidentiary hearing. That determination was left to the judge principally assigned to each case.

At the trial in the present case, held on the same day that Judge Turrentine's opinion in the consolidated cases was issued, Judge Schwartz denied respondent's motion to suppress. Although Judge Schwartz had been supplied with a copy of Judge Turrentine's opinion, he decided to "make the ruling on my own in this particular case" without waiting to study the opinion (Tr. 5).[4] He ruled that "the San Clemente checkpoint is a permanent checkpoint and that the stopping of the vehicle and the search by the Border Patrol was a valid, legal search" (Pet. App. 47A).

3. The court of appeals reversed on the authority of its *en banc* decision in *United States* v. *Bowen*, 500 F.

[4] Respondent stated in his Memorandum in Opposition in this case that, "[s]ince the trial court did not read or rely on" Judge Turrentine's opinion in the consolidated proceeding, that opinion "cannot be said to be the opinion of the district court below" (p. 2). He also stated in his Response to Motion to Dispense with the Requirement of an Appendix (p. 1) that he "objects to the consideration" of Judge Turrentine's opinion because it was not considered by Judge Schwartz when he ruled on the motion to suppress. As we have shown, however, Judge Turrentine's findings are based upon the record in the consolidated proceeding, at which respondent was represented by counsel. Respondent may disagree with those findings or may question their relevance to the issues in this case. But we cannot understand the basis of his contention that the opinion cannot be viewed as the opinion of the district court. The fact that Judge Schwartz ruled without studying Judge Turrentine's opinion does not mean the opinion is not part of the record in this case or that the findings contained therein cannot be relied upon by the parties in this Court.

2d 960, certiorari granted, October 15, 1974 (No. 73-6848), in which it had held by a 7-6 vote (1) that evidence seized in a warrantless, non-probable-cause, checkpoint search of an automobile for aliens—if conducted after June 21, 1973, the date of this Court's decision in *Almeida-Sanchez*—must be suppressed under the principles of that case unless the search can be said to be the "functional equivalent" of a border search, and (2) that "the search is a functional equivalent of a border search" only if it "takes place at a location where virtually everyone searched has just come from the other side of the border" or if it can be said with "reasonable certainty that the vehicle searched contained either goods which have just been smuggled or a person who had just crossed the border illegally" (500 F. 2d at 965-966).[5]

Since the search in the present case occurred on November 12, 1973, the panel held that the search was unlawful under *Bowen* and that "[t]he evidence (illegal aliens) discovered during the search should have been suppressed" (Pet. App. 1A). The court therefore reversed the judgment of conviction and, since the government would have "no case" without the aliens, directed that the indictment be dismissed (*ibid.*).

## SUMMARY OF ARGUMENT

We contend that the judgment of the court of appeals should be reversed for two reasons. First, the search of respondent's automobile, though conducted

[5] The Ninth Circuit subsequently held that routine searches at the San Clemente checkpoint do not satisfy these standards and are not the functional equivalent of border searches. *United States* v. *Morgan*, 501 F. 2d 1351 (*en banc*).

without a warrant and without probable cause to believe that aliens were unlawfully concealed within the car's trunk, did not violate the Fourth Amendment's prohibition against unreasonable searches and seizures. Unlike the warrantless roving patrol search invalidated by this Court in *Almeida-Sanchez,* a limited search of a vehicle for aliens at a fixed immigration checkpoint does not depend for its reasonableness upon advance judicial approval of the checkpoint's operation. Second, even if this Court concludes that warrantless checkpoint searches are unlawful, the deterrent purposes of the evidentiary exclusionary rule would not be served by applying that sanction with respect to the search in this case, which was conducted in good faith reliance upon a long line of decisions in the Ninth Circuit upholding the constitutionality of routine checkpoint searches without a warrant, and which antedated the Ninth Circuit's decision overruling that line of cases.

## I

Although "[t]he ultimate standard set forth in the Fourth Amendment is reasonableness" (*Cady* v. *Dombrowski,* 413 U.S. 433, 439), we recognize that "both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search" (*Almeida-Sanchez* v. *United States, supra,* 413 U.S. at 277, Mr. Justice Powell concurring). Taking all pertinent factors into account, the practice of checkpoint searches for aliens by the Border Patrol is not violative of the Fourth Amendment.

A. The search in this case, we submit, rests upon an area-wide "equivalent of probable cause" (*id.* at

279)—like that in *Camara* v. *Municipal Court*, 387 U.S. 523—which justifies the limited intrusions necessary to determine whether northbound vehicles in the Mexican border areas are carrying concealed aliens present in this country illegally. As we argued in *Almeida-Sanchez*, and as Mr. Justice Powell and the four dissenting Justices in that case recognized, the probable cause requirement for a limited search of vehicles in those areas may be satisfied even though the Border Patrol officers lack specific information casting suspicion upon the particular vehicle searched. To reject the notion of area-wide probable cause in this context and to adopt a requirement of specific probable cause for searches for aliens on roads near the border would seriously enfeeble any realistic program designed to deter the unauthorized entry of aliens into the United States and to apprehend illegally present aliens.

Of the million or more aliens present in this country illegally, about 85 percent are from Mexico. The length of our land border with Mexico and the sophisticated techniques used to smuggle aliens into this country make it impossible for the Border Patrol to combat unlawful entry solely at the border itself. Because the automobile is frequently the means used to transport illegal entrants inland to urban and agricultural job markets, Congress has authorized the Border Patrol to conduct limited searches of vehicles for aliens without warrants in the border areas. The Border Patrol's 47 traffic checkpoints, operated in the border areas pursuant to that authority, are highly effective both in apprehending illegally present aliens and in deterring illegal entry. The district court found

that "there is no reasonable or effective alternative method of detection and apprehension available to the Border Patrol" (Pet. App. 20A).

These essential checkpoint operations involve only a relatively modest intrusion upon the privacy interests of the traveling public. The checkpoints are located at points away from the flow of commuter and urban traffic. Most vehicles are permitted to pass through without stopping. Only about 8 percent are stopped for a routine inquiry concerning the citizenship of the vehicle's occupants, and only about 14 percent of those stopped are subjected to a limited inspection of those portions of a vehicle in which a human being could be concealed. At the San Clemente checkpoint, where respondent's vehicle was stopped, only about three percent of the vehicles are stopped for an inquiry of the occupants and for possible physical inspection of the car.

We submit, therefore, that the important public interest in deterring the illegal entry of aliens into this country and apprehending illegal entrants justifies the limited intrusions that occur at checkpoints. The stop and search of respondent's vehicle were incident to the reasonable operation of the San Clemente checkpoint, which the district court found to be "the primary, or cornerstone, checkpoint maintained by the Border Patrol" in southern California (Pet. App. 25A).

B. Though the search of respondent's vehicle was conducted without a warrant, we submit that it nevertheless did not violate the Fourth Amendment's proscription against unreasonable searches and seizures. While advance judicial approval may be deemed nec-

essary to ensure the reasonableness of a roving patrol search such as the one invalidated by this Court in *Almeida-Sanchez,* checkpoint operations are significantly different from roving patrol operations, and in view of those differences a warrant procedure for checkpoints would have little if any utility in enhancing the reasonableness of checkpoint searches.

In the first place, the network of checkpoints along the southwestern border is not the product of spontaneous decisions in reaction to specific factual perceptions of law enforcement officers (where the risk of arbitrary, capricious, or simply mistaken action is greatest), but is the result of careful study by relatively high-level officials of the Border Patrol. Moreover, frequent, periodic judicial approval of the operation of a particular checkpoint is unnecessary because the location and operating procedures of checkpoints do not vary substantially from day to day or even from month to month. Once the reasonableness of a checkpoint has been litigated in the context of a motion to suppress—or, as in this case, as part of a consolidated fact-finding proceeding—the court's determination would serve the same function that a warrant might otherwise serve by ensuring that the future operation of the same checkpoint is reasonable.

Furthermore, a warrant procedure is likely to be unworkable. Because the effectiveness of the Border Patrol's 47 traffic checkpoints depends upon coordination among the operations in neighboring sectors, an advance judicial determination of the reasonableness of one checkpoint would require consideration of information relating to others, including some that may be located in other judicial districts. A magistrate who

refused to issue a warrant for one checkpoint could disrupt the deterrent effectiveness of the entire system. That potential problem is likely to be intensified by the existing uncertainty in the lower federal courts concerning the validity of checkpoint warrants under the Fourth Amendment.

## II

If this Court nevertheless determines that a warrantless checkpoint search violates the Fourth Amendment, we submit that the exclusionary rule should not be applied in this case. The search here was conducted after this Court's decision in *Almeida-Sanchez* but before the Ninth Circuit's *en banc* decision in *United States* v. *Bowen, supra,* in which that court overruled a long line of its own prior decisions upholding the constitutionality of the kind of search conducted here.

*Almeida-Sanchez* did not involve the validity of checkpoint searches, and the considered judgment of the Department of Justice was that the rationale of that decision did not extend to searches conducted at fixed checkpoints. Prior to the decision in *Bowen,* therefore, the Border Patrol continued to operate its checkpoints in the manner that the Ninth Circuit had repeatedly approved in the past. It was *Bowen,* not *Almeida-Sanchez,* that represented "a clear break with the past" (*Desist* v. *United States,* 394 U.S. 244, 248) insofar as checkpoint searches are concerned. The deterrent purpose underlying the exclusionary rule would, in these circumstances, not be served by applying that sanction with respect to a search conducted in good faith reliance on the law of the Ninth Circuit as it existed prior to *Bowen.*

It is not significant that *Bowen* was a court of appeals decision or that the law upon which reliance was placed was the law of the Ninth Circuit. This Court has held that a Supreme Court decision overruling established authority in a court of appeals can raise a retroactivity issue (*Chevron Oil Co.* v. *Huson,* 404 U.S. 97), and it is settled that a court of appeals may determine that one of its own decisions should not be applied retroactively.

## ARGUMENT

### I. A WARRANT IS NOT REQUIRED FOR A LIMITED SEARCH OF A VEHICLE FOR ALIENS AT A FIXED BORDER PATROL CHECKPOINT

This Court held in *Almeida-Sanchez* v. *United States, supra,* that a "roving patrol" search of an automobile for aliens, without probable cause or reasonable suspicion, is unlawful in the absence of a warrant. The majority stated, however, that "routine inspections and searches of individuals or conveyances seeking to cross our borders * * * may in certain circumstances take place not only at the border itself, but at its functional equivalents as well" (413 U.S. at 272). Thus, "searches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, might be functional equivalents of border searches" (*id.* at 272–273).

The district court in the present case, relying upon the majority's language in *Almeida-Sanchez,* found that routine searches for aliens at the San Clemente checkpoint are permissible because they are the functional equivalent of border searches (Pet. App. 35A). The Ninth Circuit subsequently held, however, based

upon its definition of "functional equivalent" in the *Bowen* opinion (see p. 9, *supra*), that the San Clemente checkpoint is *not* the functional equivalent of the border. *United States* v. *Morgan*, 501 F. 2d 1351 (*en banc*).

We now think that the Ninth Circuit's definition of "functional equivalent" is substantially correct and that a full-scale, border-type search of a vehicle for aliens or contraband may be conducted, other than at the border itself, only when it can be said with reasonable assurance under the circumstances that the vehicle or its contents have recently crossed the border. The Border Patrol, however, makes no claim of authority routinely to conduct full border searches at fixed inland checkpoints. It claims only the authority to conduct a limited inspection of those portions of a vehicle—usually in the trunk and perhaps under the hood, behind the back seat, or underneath the car—where a human being could reasonably be concealed. We accordingly do not and need not contend that the San Clemente checkpoint is the functional equivalent of the border.

The issue here, therefore, is the one left undecided in *Almeida-Sanchez*: "the constitutional propriety of searches at permanent or temporary checkpoints removed from the border or its functional equivalent" (413 U.S. at 276, Mr. Justice Powell concurring).[6] We contend that the Fourth Amendment does not prohibit the limited searches for aliens that are conducted

[6] Although the majority did not specifically address that issue, the four dissenting Justices, speaking through Mr. Justice White, stated that "apparently" it is not "disputed that warrantless searches for aliens without probable cause may be made at fixed checkpoints away from the border" (413 U.S. at 288).

without warrants at fixed checkpoints. Grounding our contention principally upon the reasoning of Mr. Justice Powell's concurring opinion in *Almeida-Sanchez*, we focus in this brief on the considerations underlying his conclusion in that case that the Border Patrol should "obtain advance judicial approval of the decision to conduct roving searches on a particular road or roads for a reasonable period of time" (413 U.S. at 283). It is our submission that those considerations do not apply with equal force in the context of searches for aliens at fixed checkpoints and that "advance judicial approval" is not essential to assure the reasonableness of the Border Patrol's checkpoint operations.[7]

A. THERE EXISTS AN AREA-WIDE EQUIVALENT OF PROBABLE CAUSE FOR THE LIMITED VEHICLE SEARCHES CONDUCTED AT FIXED CHECKPOINTS

The Fourth Amendment guarantees "[t]he right of the people to be secure * * * against unreasonable searches and seizures" and provides that "no warrants shall issue, but upon probable cause * * *." Although the two clauses are often considered intertwined, so that a search of private property may be deemed un-

[7] We are aware that Mr. Justice Powell joined the opinion of the Court in *Almeida-Sanchez*. We are also aware, however, that his vote was the decisive one in that case and that his separate concurring views there may hold the key to the outcome of the present case. While we therefore quite frankly address some of the arguments in this brief principally to Mr. Justice Powell, we do so in the belief that the views expressed in his concurring opinion in *Almeida-Sanchez* are not inconsistent with the views expressed in the majority opinion. To understand the narrow holding of *Almeida-Sanchez* requires, in our view, a reading of both the majority opinion and the concurring opinion.

reasonable unless authorized by a warrant issued upon a showing of probable cause, "reasonableness is still the ultimate standard." *Camara* v. *Municipal Court*, 387 U.S. 523, 539; *Cady* v. *Dombrowski*, 413 U.S. 433, 439. Thus, while "both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search" (*Almeida-Sanchez* v. *United States, supra*, 413 U.S. at 277, Mr. Justice Powell concurring), there are some circumstances in which a search may be reasonable even without a warrant and without probable cause.

In this portion of our brief, we put aside the question whether the absence of a warrant means that the checkpoint search in this case was unreasonable, and we discuss the manner in which the concept of probable cause bears on the reasonableness of the search. Although the checkpoint search in the present case was conducted without the particularized probable cause normally required for an automobile search, we submit that it was nonetheless reasonable because of the unique circumstances that exist in the area of this country's border with Mexico. The search of respondent's vehicle was an integral part of the Border Patrol's overall traffic checkpoint program in the border area, and that program, founded upon an area-wide "functional equivalent of probable cause" (*ibid.*), is itself reasonable under the Fourth Amendment.

*1. Probable cause may be established on the basis of conditions in an area as a whole*

Under this Court's decisions, the concept of probable cause is flexible. Its existence depends upon whether "a valid public interest justifies the intrusion contemplated" (*Camara* v. *Municipal Court, supra,*

387 U.S. at 539). In the usual case, the permissible reason to conduct a search must be focused with particularity upon the object of the search. But the Court has recognized that the probable cause requirement may be satisfied in some circumstances by knowledge of conditions in an "area as a whole" rather than by "specific knowledge" with respect to the particular object of the search (*id.* at 536, 538).

*Camara* involved a city-wide program of routine and periodic building inspections to identify housing code violations. This Court ruled that the constitutionality of any particular inspection turned not upon the existence of probable cause to believe that a violation would be uncovered in the particular building to be inspected, but upon the reasonableness of the inspection program itself. "[T]he agency's decision to conduct an area inspection is unavoidably based on its appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular building" (387 U.S. at 536). The Court held that, if entry to a particular building was refused, a warrant could be issued on the basis of this area-wide probable cause, "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling" (*id.* at 538). See also *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72; *United States* v. *Biswell,* 406 U.S. 311.

Similarly, as Mr. Justice Powell's concurring opinion in *Almeida-Sanchez* recognizes, the reasonableness of a search of an automobile for aliens does not necessarily depend upon the existence of probable cause to believe that a concealed alien will be found in that

automobile. Rather, "there may exist a constitutionally adequate equivalent of probable cause to conduct roving vehicular searches in border areas," "where the concentration of illegally present aliens is high, both in absolute terms and in proportion to the number of persons legally present" (413 U.S. at 279). In those circumstances, a limited search of a vehicle for aliens may be reasonable despite the absence of specific probable cause with respect to a particular vehicle, if the traffic inspection program as a whole is itself reasonable and if the particular inspection satisfies the criteria for conducting the area-wide program.

*2. The special conditions in the area of the Mexican border give rise to an area-wide equivalent of probable cause to conduct limited searches of vehicles for aliens at established traffic checkpoints*

The factors that persuaded Mr. Justice Powell in *Almeida-Sanchez* that "there may exist a constitutionally adequate equivalent of probable cause to conduct roving vehicular searches in border areas" (413 U.S. at 279)—"consistent judicial approval, absence of a reasonable alternative for the solution of a serious problem, and only a modest intrusion on those whose automobiles are searched" (*ibid.*)—exist with even greater force in the context of the Border Patrol's traffic checkpoint operations.

*a. There is a high concentration of illegally present aliens in the Southwest border region*

In the Mexican border area, as Mr. Justice Powell recognized, "the concentration of illegally present aliens is high, both in absolute terms and in proportion to the number of persons legally present" (413 U.S. at 279). The district court in the consolidated

proceeding in this case found that the number of aliens illegally present in this country is currently estimated as between 800,000 and 1,000,000, and about 85 percent of those aliens are citizens of Mexico (Pet. App. 7A).[8] The number has been growing rapidly. In the past decade, the number of deportable aliens apprehended by the Border Patrol nationally has increased more than ten-fold, from 38,861 in 1963 to 498,123 in fiscal year 1973 (*id.* at 12A).[9]

The essentially economic cause of this growing problem and its severe social and economic impact upon this country's Southwest region are explained in the district court's opinion (*id.* at 7A–10A). The court stated: "The net effect of this silent invasion of illegal aliens from Mexico is suffering by the aliens who are frequently victims of extortion, violence and sharp practices, displacement of American citizens and legally residing aliens from the labor market, and irritation between two neighboring countries" (*id.* at 10A). See generally Hearings before Subcommittee No. 1 of the House Committee on the Judiciary on Illegal Aliens, 92d Cong., 1st Sess.; Note, *Commuters, Illegals and American Farmworkers: The Need for a Broader Approach to Domestic Farm Labor Problems,* 48 N.Y.U. L. Rev. 440, 482–483 (1973).

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[8] Though the district court's figures correctly reflect the evidence in the consolidated proceeding, they may substantially understate the extent of the problem. The Commissioner of the Immigration and Naturalization Service recently stated that the number of aliens illegally present in this country is now estimated as "at least 6 or 7 million and is possibly as great as 10 or 12 million" (*U.S. News and World Report*, December 9, 1974, p. 77).

[9] The Border Patrol has informed us that the figure for fiscal year 1974 was 634,777, an increase of approximately 27 percent in one year.

*b. The effective policing of our national boundaries to prevent the entry of unauthorized persons presents peculiar and difficult law enforcement problems*

Because the problem of unlawful entry into this country exists principally in the Mexican border area, about 80 percent of the Border Patrol's 1,700 agents are assigned to that area. A large number of those agents are assigned to the "line watch," whereby those points most often used by border violators are kept under surveillance by officers on foot, in vehicles, or in observation aircraft. In certain active areas the Border Patrol has installed electronic equipment to detect unauthorized intrusions (see Pet. App. 13A). To seal means of egress from the immediate border area, officers routinely check transportation terminals, freight and passenger trains, and railroad yards.

Every effort is made to minimize the need to conduct alien detection activities inland by improving the efficiency of operations along the border, and the line watch is in fact effective, resulting in fiscal year 1973 in the apprehension of more than 175,000 deportable aliens (Pet. App. 13A). The great length of our land border with Mexico (nearly 2,000 miles), however, makes it impossible to detect and exclude at the border every alien who determines to enter this country unlawfully (*id.* at 13A–14A). Indeed, the district court found that "[i]ncreased manpower on line watch would not make that activity appreciably more effective" (*id.* at 14A).

As Mr. Justice Powell stated in his concurring opinion in *Almeida-Sanchez,* "it is the automobile which in most cases makes effective the attempts to smuggle aliens into this country" (413 U.S. at 279).

A common method employed by smugglers of aliens is to arrange for a group of aliens to cross the border illegally at a point away from an established port of entry and to have them make their way, often led by a guide furnished by the smuggler, to a predetermined spot where a vehicle will be waiting to transport them inland. See, for example, the facts in *United States* v. *Ketola,* 455 F. 2d 83 (C.A. 9), vacated and remanded, 409 U.S. 815, and in *Carranza-Chaidez* v. *United States,* 414 F. 2d 503 (C.A. 9). Experience shows that, once an illegal entrant has reached his inland destination, "it becomes very difficult to apprehend him" (Pet. App. 14A).

*c. Traffic checkpoints are essential to the effective enforcement of the immigration laws in the border areas*

In recognition of the Border Patrol's difficult law enforcement task, Congress determined in 1946 that authorized immigration officers should have the power to stop and search vehicles for aliens within a reasonable distance from the border without need for a warrant and without specific facts casting suspicion upon the particular vehicle to be stopped (60 Stat. 865).[10] The language of that enactment, with some modification, was carried forward in Section 287(a)(3) of the Immigration and Nationality Act of 1952, 66 Stat. 233, 8 U.S.C. 1357(a)(3), and it is in accordance with that express statutory authority that the Border Patrol conducts its present traffic checking operations. As Mr. Justice White stated in his dissenting opinion in *Almeida-Sanchez,* the authority conferred on immi-

[10] The meager legislative history is recounted in Mr. Justice White's dissenting opinion in *Almeida-Sanchez* (413 U.S. at 292–293).

gration officers by Section 287(a)(3) reflects "[t]he judgment of Congress * * * that there are circumstances in which it is reasonably necessary, in the enforcement of the immigration laws, to search vehicles * * *, without warrant or probable cause, and at locations other than at the border" (413 U.S. at 293).

We argued in *Almeida-Sanchez,* and the opinions of Mr. Justice Powell and the four dissenting Justices expressly recognized, that the roving patrol traffic checks involved in that case were an essential aspect of the Border Patrol's law enforcement program. Roving patrols, however, are used to supplement the fixed checkpoints, which constitute the principal deterrent to the inland transportation of illegally present aliens. As the district court found, "[t]he primary objective of the checkpoints is to intercept vehicles or conveyances transporting illegal aliens," and "the location of a checkpoint is determined by factors relevant to the interdiction or interception of deportable aliens who have succeeded in gaining entry in an unlawful manner or are proceeding beyond the immediate border area in violation of conditions of their admission as border crossers" (Pet. App. 15A).

Checkpoints are usually situated beyond the confluence of two or more roads leading from the border area.[11] This permits "the checking of a large volume

[11] For the Court's convenience, we have lodged with the Clerk for distribution to the Court two maps prepared by the Immigration and Naturalization Service. One shows the location of each Border Patrol checkpoint in the Southern District of California; the other shows the location of all the checkpoints in the Mexican border area. Copies of the maps have been furnished to counsel for respondent.

of traffic with a minimum number of officers" and "also avoids the inconvenience of repeated checking of commuter or urban traffic which would occur if the sites were operated on the network of roads leading from and through the more populated areas near the border" (*id.* at 15A). Most checkpoints are located more than 25 miles from the border "in order to control the unlawful movement into the interior" of non-resident border crossers who are restricted to visits within 25 miles of the border (*id.* at 16A).[12]

Sites that meet all of the Border Patrol's strategic criteria are used as "permanent" checkpoints. They "are equipped to handle a large volume of traffic on what would be a 24-hour basis except in cases of manpower shortage, poor weather, or where traffic becomes excessive causing a potential safety hazard" (*ibid.*). "Temporary" checkpoints are maintained on roads with less traffic and are operated "at irregular intervals and intermittently so as to confuse the potential violator" (*ibid.*).[13]

The checkpoints are highly effective. In fiscal year 1973, about 55,300 deportable aliens were apprehended through Border Patrol traffic checking operations, and

[12] Under 8 C.F.R. 212.6, a Mexican nonresident alien may enter this country as a nonimmigrant visitor pursuant to a border crossing card, Form I-186, which authorizes the holder to spend a maximum of 72 hours in the United States. The visit must be confined, however, to the "immediate border area," which is defined by the regulation as "within a distance of 25 miles from the Mexican border."

[13] The physical accouterments of both types of checkpoints and the manner in which Border Patrol officers check the traffic passing through them are detailed in the district court's opinion (Pet. App. 16A-18A). See page 28 and note 16, *infra*.

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most of those apprehensions took place at checkpoints (*id.* at 17A and n. 2). More than 12,000 deportable aliens were apprehended that year at the San Clemente checkpoint alone (*id.* at 25A).

The number of apprehensions, however, is not the sole or even the principal measure of a checkpoint's effectiveness. As the district court found, "the primary reason for their operation is that they effectively *deter* large numbers of aliens from illegally entering the country or violating the terms of any temporary border crossing card they may have" (*id.* at 18A; emphasis added). Were it not for the permanent and temporary checkpoints, there would be no effective deterrent to the already common smuggling technique of transporting illegal entrants inland in vehicles from points just this side of the border. As a practical matter, once the illegal entrants were safely in the trunk of an automobile or the back of a van, the Border Patrol would be powerless to intercept the illegal operation, and the aliens could easily be intermingled with the inland population.

Thus, like the roving patrols for which Mr. Justice Powell believed there could be an area-wide equivalent of probable cause, and like the unannounced inspections of firearms dealers upheld in *United States* v. *Biswell, supra,* the Border Patrol's checkpoint operations are "a crucial part" of the enforcement scheme essential to the maintenance of "a credible deterrent" (406 U.S. at 315, 316). As the district court found, "[t]he evidence presented before this court clearly establishes that there is no reasonable or effective alternative method of detection and apprehension available to the Border Patrol" (Pet. App. 20A).

*d. The checkpoint operations are conducted primarily for administrative rather than prosecutorial purposes*

As Mr. Justice Powell stated in *Almeida-Sanchez,* the Border Patrol's traffic checks "are undertaken primarily for administrative rather than prosecutorial purposes"; "their function is simply to locate those who are illegally here and to deport them" (413 U.S. at 278). Although the illegal entry and transportation of aliens may involve several criminal offenses,[14] the Border Patrol's primary mission has always been to prevent unlawful entries and to apprehend illegal entrants for deportation. Thus, as the district court found, "[o]f the approximately half million illegal aliens apprehended in fiscal 1973, virtually none were prosecuted, unless they presented counterfeit or altered documents or aided in smuggling endeavors" (Pet. App. 20A).

*e. Checkpoint searches involve only a modest intrusion upon constitutionally protected interests*

In terms of Fourth Amendment interests, this Court "has long distinguished between an automobile and a home or office" (*Chambers* v. *Maroney,* 399 U.S. 42, 48). As Mr. Justice Powell stated in *Almeida-Sanchez,* "[t]he search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building" (413 U.S. at 279). And the Border Patrol's

[14] *E.g.,* 8 U.S.C. 1324 (harboring, transporting, inducing illegal entry); 8 U.S.C. 1325 (illegal entry); 8 U.S.C. 1326 (reentry of deported or excluded alien); 18 U.S.C. 911 (false representation as citizen); 18 U.S.C. 1546 (misuse of visas, permits, and other entry documents). See generally 2 Gordon and Rosenfield, *Immigration Law and Procedure,* §§ 9.22–9.40 (1974).

traffic checkpoint procedures are far less intrusive even than a full search of an automobile.

The typical operation of a checkpoint is described in the district court's opinion (Pet. App. 16A–17A):

> When the checkpoints, whether permanent or temporary, are in operation, an officer standing at the "point" in full dress uniform on the highway will view the decelerating oncoming vehicles and their passengers, and will visually determine whether he has reason to believe the occupants of the vehicle are aliens (i.e., "breaks the pattern" of usual traffic). If so, the vehicle will be stopped (if the traffic at the checkpoint is heavy, as at the San Clemente checkpoint, the vehicle will be actually directed off the highway) for inquiries to be made by the agent. If the agent does not have reason to believe that the vehicle approaching the checkpoint is carrying aliens, he may exchange salutations, or merely wave the vehicle through the checkpoint.
>
> If, after questioning the occupants, the agent then believes that illegal aliens may be secreted in the vehicle (because of a break in the "pattern" indicating the possibility of smuggling) he will inspect the vehicle by giving a cursory visual inspection of those areas of the vehicle not visible from the outside (i.e., trunk, interior portion of camper, etc.).

At the San Clemente checkpoint, where traffic is heavy, almost all vehicles are waved through without stopping. Only three percent of the vehicles are actually stopped and directed to the side of the road for inquiry regarding the status of the occupants and for possible inspection of the car (*id.* at 26A). The Border Patrol estimates that approximately 27.4 million

vehicles passed through its checkpoints in fiscal year 1974. Approximately 2.3 million of those vehicles, or about 8 percent, were stopped for brief questioning of the occupants. Of those vehicles stopped for questioning, approximately 320,000, or about 14 percent, were subjected to a physical inspection. Testimony in the consolidated proceeding before the district court showed that even those vehicles subjected to a physical inspection are ordinarily detained for only two to three minutes (R.T. 179).

Even the most thorough physical inspection of an automobile at a checkpoint is limited to those places where a human being could reasonably be concealed. In most instances, the officer will take only a brief look in the trunk of the car, though on occasion he may look under the hood, underneath the chassis, or perhaps behind the back seat (R.T. 331–332).[15] Except in cases when the limited questioning or inspection reveals facts constituting traditional probable cause, the officer conducts no search of the car's glove compartment or of ordinary suitcases, handbags, or containers, and the vehicle's occupants are subjected to no search of their persons.

*f. Checkpoint searches have been consistently approved by the courts*

As we show later in this brief (pp. 47–48, *infra*), checkpoint searches conducted pursuant to 8 U.S.C. 1357(a)(3) received consistent judicial approval,

[15] For a case in which an alien was found doubled up under the hood of an automobile, see *United States* v. *Ruiz-Juarez*, 456 F. 2d 1015 (C.A. 9). Several methods of concealing aliens in an automobile are illustrated by photographs introduced in evidence in the consolidated proceeding in the district court. See Govt. Exs. 16–26.

prior to this Court's decision in *Almeida-Sanchez,* by the courts of appeals in whose jurisdictions the checkpoints are operated.

*g. The San Clemente checkpoint is reasonably operated as an essential element of the Border Patrol's traffic checking program, and the search of respondent's vehicle was properly conducted as part of the checkpoint's operations*

The search of respondent's automobile took place at the San Clemente checkpoint. Located on Interstate Route 5 about 62 air miles and 66 road miles from the Mexican border, San Clemente "is the primary, or cornerstone, checkpoint maintained by the Border Patrol" in southern California (Pet. App. 25A). Together with the other checkpoints in the area, it forms a strategic network in which "each checkpoint relates to all others in such a manner as to preclude evasion by the use of bypass roads" (*id.* at 35A).

The San Clemente checkpoint is placed where "the volume of traffic is the lowest of any point on Route 5 between San Diego and Los Angeles" (*id.* at 26A). "While there is a great deal of commuter traffic south of Oceanside, the traffic at the Interstate 5 checkpoint is predominantly inter-city with few commuter vehicles passing through" (*ibid.*). The district court found that, "[b]ounded on the east by Camp Pendleton and on the west by the Pacific Ocean, the checkpoint straddles a natural corridor along which illegal aliens frequently travel in their migration towards the labor markets in the north" (*id.* at 35A).[16]

[16] The district court described the appearance of the checkpoint as follows (Pet. App. 25A):

Traffic checking operations at San Clemente are very productive. More than 12,000 deportable aliens were apprehended at the checkpoint in fiscal year 1973, and the district court found that it is common for an 8-hour shift to result in as many as 20 or 30 apprehensions (*id.* at 25A). The Border Patrol operates the San Clemente checkpoint around the clock except in times of heavy traffic or adverse weather conditions (*id.* at 26A, 35A). Although many vehicles pass through the checkpoint, only about three percent of them are stopped for even a brief inquiry concerning the citizenship of their occupants or for possible physical inspection (*id.* at 26A).

Thus, not only is the San Clemente checkpoint an integral and effective part of the network of checkpoints in the southern California area, but also it is located and operated in a manner reasonably designed to minimize disruption of and inconvenience to the innocent traveling public. The district court thus correctly concluded that it falls within the "constitu-

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"Approximately one mile south of the checkpoint is a large black on yellow sign with flashing yellow lights over the highway stating 'All Vehicles, Stop Ahead, 1 Mile.' Three-quarters of a mile further north are two black on yellow signs suspended over the highway with flashing lights stating 'Watch For Brake Lights.' At the checkpoint, which is also the location of a State of California weighing station, are two large signs with flashing red lights suspended over the highway. These signs each state 'Stop Here—U.S. Officers'. Placed on the highway are a number of orange traffic cones funneling traffic into two lanes where a Border Patrol agent in full dress uniform, standing behind a white on red 'Stop' sign checks traffic. Blocking traffic in the unused lanes are official U.S. Border Patrol vehicles with flashing red lights. In addition, there is a permanent building which houses the Border Patrol office and temporary detention facilities. There are also floodlights for nighttime operation."

tionally permissible zone within which the jealously guarded Fourth Amendment rights and legitimate needs of law enforcement can coexist" (*id.* at 36A).

The brief stipulation in this case does not reflect whether the Border Patrol officers who stopped and inspected the trunk of respondent's automobile had any specific, articulable basis for suspecting that his car contained concealed aliens. So far as this record shows, and there is no claim to the contrary, the stop and search were made routinely as part of the checkpoint's regular operation. Thus, while the officers may have lacked specific probable cause to stop respondent's vehicle, that stop, like the other routine stops made at the checkpoint, rests upon the area-wide probable cause that justifies the operation of the checkpoint itself.

Insofar as the concept of probable cause bears upon the reasonableness of the officers' actions in this case, therefore, we submit that the stop and search were reasonable under the Fourth Amendment, because "a valid public interest justifies the intrusion contemplated" by the operation of the San Clemente checkpoint, and "reasonable legislative or administrative standards for conducting an area inspection [were] satisfied with respect to [the] particular" search in this case (*Camara* v. *Municipal Court, supra,* 387 U.S. at 538, 539).

B. ADVANCE JUDICIAL APPROVAL FOR THE OPERATION OF A CHECKPOINT, THROUGH THE WARRANT PROCEDURE, WOULD NOT MATERIALLY ENHANCE THE REASONABLENESS OF THE LIMITED SEARCHES CONDUCTED AT THE CHECKPOINT; FOURTH AMENDMENT VALUES WOULD BE ADEQUATELY PROTECTED BY SUBSEQUENT JUDICIAL CONSIDERATION OF THE REASONABLENESS OF THE CHECKPOINT'S OPERATION IN THE CONTEXT OF MOTIONS TO SUPPRESS EVIDENCE

1. Much of what we have said in the foregoing discussion concerning area-wide probable cause we also said in our brief to this Court in *Almeida-Sanchez.* That does not mean, however, that we seek here to reargue issues that were decided against us in that case. On the contrary, we have only reiterated here so much of our argument in that case as the majority did not reject and as Mr. Justice Powell and the four dissenting Justices accepted—namely, that the special conditions in the Mexican border areas provide an area-wide "functional equivalent of probable cause" (413 U.S. at 277) that justifies the limited intrusions occasioned by the Border Patrol's traffic checking operations in that region.

The existence of "a constitutionally adequate equivalent of probable cause" (*id.* at 279) does not end the inquiry, however, because, as Mr. Justice Powell stated, "both the concept of probable cause *and* the requirement of a warrant bear on the reasonableness of a search" (*id.* at 277; emphasis added). In *Almeida-Sanchez,* therefore, the further question was whether requiring "a prior judicial determination" of the reasonableness of the Border Patrol's plan for a particular roving patrol operation would be an effective and feasible means of assuring that the plan represents a reasonable "balance[e] of the legitimate

interests of law enforcement with protected Fourth Amendment rights" (*id.* at 284).

Mr. Justice Powell concluded, rejecting our argument to the contrary, that advance judicial approval of a roving patrol operation would be feasible and effective, would not frustrate the government's purpose for the operation, and would materially enhance the reasonableness of a roving patrol search (413 U.S. at 279–285). He therefore joined the opinion of the Court, which held that a roving patrol search without a warrant was unreasonable under the Fourth Amendment.

We do not here urge the Court to reconsider its decision in *Almeida-Sanchez*. We do argue that there are significant differences between a roving patrol or "area search" operation (413 U.S. at 284) on the one hand and a fixed checkpoint operation on the other hand, and that those differences should lead to different results on the question of the need for a warrant.

We submit that prior judicial approval of a fixed checkpoint operation, in contrast to approval of a roving patrol operation, would add little to the reasonableness of the stops and limited searches conducted at the checkpoint. A *subsequent* judicial determination in connection with a motion to suppress evidence would adequately protect the right of the people under the Fourth Amendment "to be secure * * * against unreasonable searches and seizures * * *."

2. On a roving patrol operation, Border Patrol officers cruise in a patrol car in order to observe traffic in a prescribed area. When they see a vehicle that arouses their subjective suspicion, they pursue and

stop it and usually subject it to a search for concealed aliens. Roving patrols are usually conducted at night on infrequently traveled roads. The areas of operation may vary from season to season and even from night to night. By the nature of the operation, one roving patrol may be quite unlike another, even in the same area.

Checkpoint operations, by contrast, are conducted at stationary locations where officers ordinarily inspect only those vehicles that approach the checkpoint. Most checkpoints are located on major thoroughfares and are highly visible.[17] They are operated in daylight or at night under floodlights, in some cases on a 24-hour basis. The vehicle inspection procedure is regularized (Pet. App. 16A–17A), and one day's operation is essentially the same as any other's.

These differences between roving patrol and fixed

[17] The district court stated (Pet. App. 17A–18A): "In actual operation the checkpoints, be they 'permanent' or 'temporary,' have the same basic accounterments. Typically, about one-half mile to one mile south of the checkpoint is the first notification that the checkpoint is ahead. The notice is in the form of a black on yellow sign indicating 'STOP AHEAD' which has floodlights for nighttime illumination, *Handbook* at 9–9. Next, about 200 yards from the checkpoint is another sign cautioning the traffic to slow down or to be careful; this sign usually has flashing yellow lights attached. For the fifty yards directly south of the checkpoint there are placed traffic cones evenly spaced along each side of the highway. The actual checkpoint has a sign indicating to the traffic to stop, with official Border Patrol vehicles parked on each side of the stop zone showing the official Border Patrol emblem and/or the designation U.S. OFFICERS. At this point the agents assigned at the 'point,' in their official uniform, conduct checking and inspection operations. Beyond the checkpoint is usually a sign indicating 'THANK YOU.'"

checkpoint operations are significant for several reasons.

(a) First, because a checkpoint is stationary and its routine operation is consistent from day to day and even from year to year, there is little need for periodic *ex parte* judicial approval in *advance* of its operation during a particular week or month. The reasonableness of the checkpoint's operation can effectively be adjudicated for the first time in an adversary criminal proceeding, and, once the court has determined that the operation of a particular checkpoint is reasonable, that reasonableness would not be substantially enhanced by repeated approvals in advance of subsequent periods of operation.

We recognize that the determination whether to conduct a checkpoint operation "involves a balancing of legitimate interests of law enforcement with protected Fourth Amendment rights" and therefore "presents the type of delicate question of constitutional judgment which ought to be resolved by the Judiciary rather than the Executive" (413 U.S. at 284, Mr. Justice Powell concurring). In view of the special characteristics of fixed checkpoints, however, that judicial determination, once made for a particular checkpoint in the context of a motion to suppress, serves the same function that would be served in other circumstances by a warrant.

Since the reasonableness of the operation as a whole is the principal issue with respect to a checkpoint, and since the operation is ordinarily subject to no variation in terms of location and little if any in terms of operating procedure, an initial judicial determination

that a particular checkpoint search was reasonable can and should suffice to validate the future operation of the checkpoint as well.[18]

That is not to say that an aggrieved person may not thereafter allege and prove in a particular factual setting that the stop and search of his automobile was unlawful or that the checkpoint's operation is unreasonable. We submit, however, that the Fourth Amendment values at stake are adequately protected when those claims are adjudicated *after* a checkpoint search has been conducted and in the context of an adversary proceeding on specific facts.

The roving patrol situation is different. Since the circumstances of any particular operation are likely to be unique, prior approval of past operations is not necessarily an accurate measure of the reasonableness of the present one. Consequently, prior judicial approval of a roving patrol operation, based upon considerations such as those stated in Mr. Justice Powell's concurring opinion (413 U.S. at 283–284), may be viewed as a meaningful enhancement of the operation's reasonableness.

Whereas the "basic agency decision" (*id.* at 283) to operate a roving patrol in a particular area is made repeatedly, each time on the basis of varying factors, the basic decision to operate a checkpoint at a particular location is made only once, and the pertinent factors remain relatively unchanged in the absence of

[18] Indeed, the district court's opinion in the consolidated proceeding here amounts to a determination that the checkpoints in the southern California area are reasonably located and reasonably operated in light of the public interest involved and the nature and extent of the intrusions contemplated.

changed conditions, such as significant new highway construction. The significance of any such changed conditions can adequately be litigated on a motion to suppress. To require frequent, periodic *ex parte* presentations by the government to justify continuation of a checkpoint's operations would spend valuable judicial and administrative resources to achieve no important Fourth Amendment purpose.

We think it is also relevant that, since there is significantly less flexibility in the operation of a fixed checkpoint than in the operation of a roving patrol, there is correspondingly less need for judicial supervision of the manner and scope of the operation. The basic decisions regarding the establishment and manner of operation of the checkpoints are made by relatively high-ranking officials of the Border Patrol, and the occasions for arbitrary or capricious actions by the "cop on the beat" are correspondingly minimized. Accordingly, the procedures at a fixed checkpoint present less danger that Border Patrol officers will abuse what the majority in *Almeida-Sanchez* referred to as "unfettered discretion" (413 U.S. at 270). Cf. Note, *Automobile License Checks and the Fourth Amendment*, 60 Virginia L. Rev. 666, 670–672 (1974).

(b) Second, a warrant procedure for checkpoints is likely to be unworkable. The Border Patrol operates 17 permanent and 30 temporary checkpoints in California, Arizona, New Mexico, and Texas, within the jurisdiction of six different federal judicial districts.[19]

[19] Central District of California, Southern District of California, District of Arizona, District of New Mexico, Western District of Texas, Southern District of Texas.

Though spread over the entire southwest border region, the checkpoints form a cohesive network in which each is coordinated with others in the same vicinity. The deterrent effectiveness of the entire network depends upon that coordination.

As the district court found in the consolidated proceeding in this case, "[t]he placement of the checkpoints and their operations are coordinated between the two sectors located in this district and with Border Patrol activities to the east in Arizona" (Pet. App. 17A). Consequently, "the checkpoints in the Southern District ought to be conceptualized as parts of a systemic, integrated whole in which each part is, to some extent, interdependent upon the functioning of the other parts" (*id.* at 38A).

In the Chula Vista Sector in California, for example, where "[t]he San Clemente checkpoint is the cornerstone of the checkpoint system" (*id.* at 35A), its location determines the location of the others, because "each checkpoint relates to all others in such a manner as to preclude evasion by the use of bypass roads" (*ibid.*). Thus, "[t]he checkpoints in the Chula Vista Sector reenforce each other and each prevents the circumvention of any other checkpoint; they are a system and one cannot be tampered without affecting the positioning of the others" (*id.* at 37A).

The interrelationship of the Border Patrol's 47 checkpoints makes it difficult to conceive of a workable warrant procedure. For a court to review the basic agency decision to operate a particular checkpoint would require consideration of information relating not only to the checkpoint in question but also

to other checkpoints in the same sector [20] as well as checkpoints in neighboring sectors. Denial of a warrant for a particular checkpoint could seriously reduce the deterrent effectiveness of the entire system, and it may not always be possible to obtain prompt judicial approval of revised plans to compensate for the absence of a particular checkpoint.

Even if it would be feasible to seek warrants for all the checkpoints in a judicial district at one time—that is, to make periodic *ex parte* presentations of information such as that presented in an adversary context in the consolidated proceeding that included the present case—the magistrate or judge presumably could not issue warrants for any coordinate checkpoints located outside his judicial district (Rule 41(a), Fed. R. Crim. P.). The relationship between the checkpoints, however, does not end at the district boundary. If the magistrates in neighboring districts should take different views of the information presented to them, the coordination of the system, and its deterrent effectiveness as a whole, could be seriously disrupted. That risk of disruption would, of course, increase geometrically to the extent that warrants for each checkpoint must be justified and obtained separately from a variety of issuing magistrates.

(c) Disruptive denials of warrants may also result from the existing uncertainty concerning the lawfulness under the Fourth Amendment of the kind of area or checkpoint warrant that would be required. Although Mr. Justice Powell and the four dissent-

[20] There are nine Border Patrol "sectors" in the southwest region, each of which is headed by a Chief Patrol Agent.

ing Justices in *Almeida-Sanchez* expressly stated their view that such a warrant for roving patrol searches would pass constitutional muster (413 U.S. at 283–285, 288), the judges of the Southern District of California have reached conflicting decisions concerning the lawfulness of even a *stop* at a checkpoint pursuant to an area type warrant.[21]

(d) There is another practical problem. To maximize the effectiveness of the Border Patrol's overall traffic checking operations, experience has shown that the Chief Patrol Agent in each sector must retain flexibility in operating the various checkpoints within his jurisdiction. It is not always possible to anticipate when law enforcement strategy will require the operation of a particular checkpoint.

At times, specific information about expected smuggling activity, changed weather or manpower conditions, or perhaps just the seasoned judgment of an experienced patrol agent will indicate, for example, that a regular checkpoint should be shut down for an afternoon and an infrequently used temporary checkpoint be placed in operation. But the need may not arise frequently enough or with sufficient predicta-

[21] The issue was argued before a panel of the Ninth Circuit in several consolidated cases on November 5, 1974. *United States* v. *Martinez-Fuerte*, Nos. 74–2462, *et al.*

The warrants that have been obtained for checkpoints in the Southern District of California in the wake of the Ninth Circuit's decisions in *United States* v. *Bowen*, *supra*, and *United States* v. *Brignoni-Ponce*, 499 F. 2d 1109, have with few exceptions given the Border Patrol authority only to stop vehicles for purposes of inquiry. Searches have been made, therefore, only with consent or on the basis of probable cause. The warrants have uniformly been limited to periods of 10 days.

bility to justify seeking a warrant for it during any particular ten-day period. The effect of a warrant requirement in circumstances like these could be to confine the Border Patrol's enforcement efforts to those checkpoints operated regularly and thereby to diminish the effectiveness of the traffic checking operations as a whole. To that extent, it would "frustrate the governmental purpose" behind that program (*Camara* v. *Municipal Court, supra,* 387 U.S. at 533).

(e) Finally, insofar as a warrant serves the function of apprising the subject of a search that the officer is acting pursuant to lawful authority (see *id.* at 532), the need for it is reduced in the context of a checkpoint stop. A traveler stopped by a roving patrol on a lonely back road in the early morning hours might well have "no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization" (*ibid.*). A warrant might serve the meaningful function of evidencing that authority.

A highway checkpoint, however, would not likely raise the same questions in the mind of a traveler, particularly in the border regions involved in this case, where the Border Patrol has been operating such checkpoints since at least 1927 (Pet. App. 14A). Those checkpoints are a familiar sight to persons in that area, and the physical setting of a checkpoint carries its own indicia of lawful authority.

Notice of the checkpoint is usually placed at least one-half mile to the south. The approach is carefully marked with signs and traffic cones and is illuminated with floodlights at night. The checkpoint itself has a

sign directing traffic to stop, and official Border Patrol vehicles are parked on each side of the stop zone. The official Border Patrol emblem and the designation "U.S. OFFICERS" is exhibited. The Border Patrol officers are uniformed.

In these circumstances, a warrant is unnecessary to evidence the authority of the inspecting officers.

II. EVEN IF WARRANTS ARE REQUIRED FOR CHECKPOINT SEARCHES, THE EXCLUSIONARY RULE SHOULD NOT BE APPLIED TO CHECKPOINT SEARCHES THAT WERE CONDUCTED PRIOR TO THE NINTH CIRCUIT'S DECISION IN *UNITED STATES V. BOWEN*

If the Court agrees with our contentions in the first part of the brief and holds that a warrant is not necessary to assure the reasonableness of a Border Patrol checkpoint operation, then it need not reach the issue discussed in this part of the brief—whether a contrary holding would require the suppression of evidence seized in a warrantless search conducted at a time when the law in the Ninth Circuit *permitted* warrantless checkpoint searches. If the Court reaches the issue, we submit that, viewed from the standpoint either of retroactivity doctrine or of exclusionary rule policy, the evidence derived from the stop and search of respondent's vehicle was properly admitted at the trial of this case.[22]

[22] The evidence was the subject of a stipulation (Pet. App. 43A–45A) that stated the nature of the testimony that would have been given by three Border Patrol officers and by the three aliens who were found in respondent's trunk. The court received the testimony pursuant to the stipulation for purposes of both the suppression motion and the trial (*id.* at 47A–48A).

A. THE NINTH CIRCUIT'S DECISION IN *BOWEN* WAS A NEW APPLICATION OF THE FOURTH AMENDMENT'S EXCLUSIONARY RULE; IT SHOULD NOT BE APPLIED RETROACTIVELY TO SEARCHES CONDUCTED BEFORE THE DATE OF THE DECISION IN THAT CASE

In *United States* v. *Bowen, supra,* the Ninth Circuit, sitting *en banc,* ruled for the first time that checkpoint searches conducted without specific probable cause are unlawful in the absence of a warrant. The court believed this result to follow from the decision in *Almeida-Sanchez,* and it also held, applying familiar principles concerning the retroactivity of constitutional rulings, that its application of *Almeida-Sanchez* to checkpoint searches should not be given retroactive effect. It concluded, however, that the cut-off date for retroactivity purposes should not be May 9, 1974, the date of its decision in *Bowen,* but rather June 21, 1973, the date of this Court's decision in *Almeida-Sanchez.*

Since the stop and search of respondent's vehicle in the present case occurred on November 12, 1973 (Pet. App. 44A), the court of appeals panel, applying the *Bowen* decision, held that the evidence derived from the stop and search must be suppressed. We contend that the *Bowen* court's reasoning on the retroactivity issue, with which we agree in nearly all respects, should have resulted in a cut-off date of May 9, 1974, rather than June 21, 1973, and that the new rule for checkpoints should not have been applied to searches, like the one here, that occurred after this Court's decision in *Almeida-Sanchez* but before the Ninth Circuit's decision in *Bowen.*

*1. New applications of the evidentiary exclusionary rule, designed to deter future violations of the Fourth Amendment, should not be given retrospective effect*

We start with a proposition that we believe is now beyond dispute. Under this Court's prior decisions, a new application of the evidentiary exclusionary rule designed to enforce the Fourth Amendment is to be given prospective effect only. See *Linkletter* v. *Walker*, 381 U.S. 618; *Desist* v. *United States*, 394 U.S. 244; *Williams* v. *United States*, 401 U.S. 646.

That is so because the "prime purpose" of the exclusionary rule "is to deter *future* unlawful police conduct" (*United States* v. *Calandra*, 414 U.S. 338, 347; emphasis added). "We cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police * * * has already occurred and will not be corrected by releasing the prisoners involved" (*Linkletter* v. *Walker*, *supra*, 381 U.S. at 637).[23]

[23] We recognize that the retroactivity determination depends not only on the purpose of the new rule but also on the extent to which law enforcement authorities reasonably relied upon the old standards and on the likely impact that retroactive application would have on the administration of justice. *Stovall* v. *Denno*, 388 U.S. 293, 297; *Desist* v. *United States*, *supra*, 394 U.S. at 249. In the context of the Fourth Amendment's exclusionary rule, however, the other factors are of minimal significance, because the rule's "deterrent purpose * * * overwhelmingly supports nonretroactivity" (*id.* at 251).

In any event, both of the other factors also support prospectivity for the ruling in *Bowen*. As we show later in this brief (pp. 49–50), the government reasonably relied on prior law in the Ninth Circuit in conducting checkpoint operations after *Almeida-Sanchez* and before *Bowen*. Applying *Bowen* retroactively, even if only to the date of this Court's decision in *Almeida-Sanchez*, would affect a substantial number of convic-

Thus, while there may be room for disagreement over whether the holding in *Bowen* with respect to checkpoint searches was or was not a new rule in the Ninth Circuit for retroactivity purposes, there can be no serious doubt about the proper consequences of a determination that it was a new rule. It should, in those circumstances, be applied only prospectively to cases in which the challenged search took place after Bowen was decided. *Desist* v. *United States, supra.*

*2. The Bowen decision was a new application of the exclusionary rule in the Ninth Circuit and should be applied only prospectively.*

The court of appeals in *Bowen* held that "*Almeida-Sanchez* as applied to fixed checkpoints enunciates a new rule of criminal procedure" (500 F. 2d at 980).[24] We agree with the thought but not with the expression. It was not *Almeida-Sanchez* that enunciated the new rule with respect to checkpoints. It was *Bowen* itself.

Whether a decision presents "a choice between prospective or retroactive application of new constitu-

tions based on evidence seized in checkpoint searches conducted before *Bowen* was decided. Many of those cases are pending in the Ninth Circuit on the government's petitions for rehearing, which are being held for the decision in this case. Many cases involving pre-*Almeida-Sanchez* checkpoint searches are before this Court on petitions for writs of certiorari. Those, too, are apparently being held pending the decision in this case and in *Bowen* (No. 73-6848).

[24] In *United States* v. *Peltier*, 500 F. 2d 985, the Ninth Circuit ruled *en banc* that *Almeida-Sanchez* did *not* announce a new rule with respect to roving patrol searches. This Court granted certiorari in that case (No. 73-2000) to consider the correctness of that ruling.

tional doctrine" depends upon whether "it was a clear break with the past" (*Desist* v. *United States, supra,* 394 U.S. at 247, 248). We agree with the court of appeals majority in *Bowen* that, "to constitute a new rule, the decision must either (1) overrule clear past precedent or (2) disrupt a practice long accepted and widely relied upon" (500 F. 2d at 975).[25] *Bowen* did both.

The Border Patrol has operated fixed immigration checkpoints on roads and highways in the Mexican border area since about 1927 (Pet. App. 14A). In 1946, Congress determined that the effective enforcement of the immigration laws required special measures in the border areas. It therefore gave Border Patrol officers the authority within a reasonable distance from the border to conduct limited searches of vehicles for concealed aliens without a warrant and without specific probable cause (60 Stat. 865). Since 1952, that authority has been conferred by Section 287(a)(3) of the Immigration and Nationality Act, 8 U.S.C. 1357(a)(3), and it is implemented by published regulations of the Immigration and Naturalization Service (8 C.F.R. 287.1).

The practice of operating immigration checkpoints and the authority of Border Patrol officers to conduct limited searches of vehicles were first challenged in the Ninth Circuit in 1963. The court of appeals held that the "statute represents congressional recognition of the right of the United States to protect its own

[25] The test is drawn from the dissenting opinion of Mr. Justice Stewart in *Milton* v. *Wainwright*, 407 U.S. 371, 381–382, n. 2.

boundaries against the illegal entry of aliens and is, we think, clearly constitutional" (*Fernandez* v. *United States,* 321 F. 2d 283, 285). It therefore upheld the stop and subsequent search of an automobile at a California checkpoint located 60 to 70 miles from the Mexican border on Highway 101.[26]

The Ninth Circuit thereafter repeatedly upheld against constitutional attack warrantless checkpoint searches of vehicles for aliens. *E.g., Barba-Reyes* v. *United States,* 387 F. 2d 91; *United States* v. *Avey,* 428 F. 2d 1159, certiorari denied, 400 U.S. 903; *Fumagalli* v. *United States,* 429 F. 2d 1011; *Duprez* v. *United States,* 435 F. 2d 1276; *Mienke* v. *United States,* 452 F. 2d 1076; *United States* v. *Foerster,* 455 F. 2d 981, vacated and remanded, 413 U.S. 915; *United States* v. *Aranda,* 457 F. 2d 761.[27]

In these circumstances, the Border Patrol reasonably believed that checkpoint operations in the border areas were constitutionally permissible and validly authorized by statute. As the Ninth Circuit stated in *Bowen,* "[i]f the border patrol agents cannot rely upon a statute supported by clear regulations

[26] The search was conducted after the officers stopped the vehicle, determined that the driver was a Mexican alien, directed him to the side of the road for further questioning, and smelled the odor of marihuana emanating from under the hood of the car (321 F. 2d at 284–285).

[27] The Fifth and Tenth Circuits had also upheld such searches. *E.g., United States* v. *De Leon,* 462 F. 2d 170 (C.A. 5), certiorari denied, 414 U.S. 853; *United States* v. *McDaniel,* 463 F. 2d 129 (C.A. 5), certiorari denied, 413 U.S. 919; *United States* v. *McCormick,* 468 F. 2d 68 (C.A. 10), certiorari denied, 410 U.S. 927; *United States* v. *Anderson,* 468 F. 2d 1280 (C.A. 10).

which have repeatedly been upheld by a Court of Appeals with no Supreme Court disapproval, it is difficult to conceive what degree of official pronouncements would be necessary to make their reliance justified" (500 F. 2d at 979).

That reliance continued to be justified, we submit, even after this Court's decision in *Almeida-Sanchez.* The Court there held that warrantless *roving patrol* searches were unlawful in the absence of probable cause, but the majority did not address the constitutional validity of *checkpoint* searches. Indeed, Mr. Justice White stated in his dissenting opinion that the validity of warrantless checkpoint searches was apparently undisputed (413 U.S. at 288). Mr. Justice Powell, who cast the deciding vote in the case, also clearly stated in his concurring opinion that the checkpoint issue was not involved in that case (413 U.S. at 276).

After studying the opinions in *Almeida-Sanchez,* the Department of Justice concluded, essentially for the reasons we have articulated in the first part of this brief, that the considerations underlying the Court's conclusions with respect to roving patrol searches did not apply with respect to checkpoint searches. Since the law concerning checkpoints in the Ninth Circuit (and in the Fifth and Tenth Circuits) was, in the Department's view, essentially unchanged by *Almeida-Sanchez,* it was determined that it would be proper as a matter of law and prudent as a matter of effective law enforcement to continue operating the checkpoints

in the manner previously approved by the courts of appeals.[28]

Thus, when the Ninth Circuit in *Bowen* overruled its prior decisions upholding warrantless checkpoint searches, it disrupted a law enforcement practice long accepted in that circuit and elsewhere and widely relied upon as a constitutionally permissible technique for detecting and preventing the unlawful transportation of aliens present in this country illegally. We submit, therefore, that *Bowen* constitutes a new rule for purposes of retroactivity.

Even if it could be said—as we have shown it cannot—that *Almeida-Sanchez* foreshadowed *Bowen* and that the government should have been able to predict the outcome in *Bowen* (which was decided by a 7–6 vote), this Court's decision in *Desist* v. *United States, supra*, makes clear that even a foreshadowed and predictable decision may be viewed as establishing a new rule for purposes of retroactivity if it in fact overrules past precedent.[29]

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[28] As we noted above (pp. 40–41 and n. 29, *supra*), there is substantial confusion over whether checkpoint warrants may properly be issued.

[29] In *Desist*, this Court refused to give retroactive effect to *Katz* v. *United States*, 389 U.S. 347, which for the first time expressly abandoned the Fourth Amendment "trespass' doctrine of *Olmstead* v. *United States*, 277 U.S. 438. Even prior to *Katz*, however, the Court had already "departed from the narrow view on which [*Olmstead*] rested" (389 U.S. at 353). Indeed, "the underpinnings of *Olmstead* * * * [had] been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated [could] no longer be regarded as controlling" (*ibid.*). Mr. Justice Fortas thus stated in his dissenting opinion in *Desist* that "*Katz* did no more than administer the *coup de grace* to [*Olmstead's*] moribund doctrine" (394 U.S. at 273). The ruling in *Katz*, he said, was "neither novel

*Bowen* did not, of course, overrule any prior decision of the Supreme Court. The validity of warrantless checkpoint searches is presented to this Court for the first time in this case. *Bowen* did, however, overrule past precedent in the Ninth Circuit, and it disrupted a law enforcement practice conducted in reasonable reliance upon that past precedent. All the purposes served by giving only prospective effect to decisions of this Court overruling its own prior cases in the Fourth Amendment area are fully applicable when a court of appeals overrules *its* own prior cases in that area.

Respondent argued in his Memorandum in Opposition that the Ninth Circuit's repeated approval of warrantless checkpoint searches was merely an unjustified departure from "the well-established doctrine first enunciated by this Court in *Carroll* v. *United States*" and that the Ninth Circuit's "return to [that doctrine] on 9 May 1974 in *Bowen* raises no retroactivity issue" (p. 5). But that is an argument from hindsight. Even if, contrary to our argument in the first part of this brief, the Ninth Circuit correctly concluded on a vote of 7–6 that warrantless checkpoint searches are unlawful, it surely cannot be argued that the government should have recognized all along that the Ninth Circuit's consistent approval of checkpoint searches was aberrational and incorrect.

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nor unanticipated" (*id.* at 271); it was fully predictable from "the plain purport of our decisions" (*id.* at 277).

The Court nevertheless held that *Katz*, by expressly overruling *Olmstead*, established a new rule for purposes of retroactivity. "However clearly our holding in *Katz* may have been foreshadowed, it was a clear break with the past, and we are thus compelled to decide whether its application should be limited to the future" (*id.* at 248).

To say that *Bowen* raises no retroactivity issue is to suggest that a decade of repeated judicial approval of a law enforcement practice by a federal court of appeals may not reasonably be relied upon by the government in the exercise of its law enforcement responsibilities. But "statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct" (*Lemon* v. *Kurtzman,* 411 U.S. 192, 199 (opinion of Chief Justice Burger)). Applying the exclusionary rule with respect to checkpoint searches conducted prior to *Bowen* would not further the deterrent purpose of the rule. It would merely punish the government and the public for "the reliance * * * placed, in good faith, on prior law" (*Wolff* v. *McDonnell,* No. 73–679, decided June 26, 1974, slip op. 32).

Judge Hufstedler's dissenting opinion in *Bowen* cited this Court's decision in *Robinson* v. *Neil,* 409 U.S. 505, for the proposition that "the only 'old' and 'new' law that is relevant [for retroactivity purposes] is the constitutional law enunciated by the Supreme Court" (500 F. 2d at 984). *Robinson* gave retroactive effect to *Waller* v. *Florida,* 397 U.S. 387, which barred on double jeopardy grounds successive municipal and state prosecutions for the same or a greater offense. The issue in *Robinson,* however, was not whether *Waller* was or was not a new rule but whether, *as* a new rule, it should or should not be applied retroactively. The Court stated that traditional retroactivity analysis was not suited to the problem because the *Waller* ruling was directed, not "to collateral purposes such as the deterrence of unlawful

police conduct," nor even to considerations of basic trial fairness, but rather "to the prevention of the second trial's taking place at all" (409 U.S. at 509). In weighing the competing considerations with respect to a retroactivity ruling that would affect all second convictions, the Court recognized that the State might have relied upon the discarded "dual sovereignty" analogy in permitting the municipal prosecution to occur first.

The Court concluded, however, that the State's reliance did not warrant substantial weight. Since the Supreme Court had not earlier considered the question, "*Waller* cannot be said to have marked a departure from past decisions of this Court," and "the State's reliance on lower court decisions supporting the dual sovereignty analogy was a good deal more dubious than the justification for reliance that has been given weight in our *Linkletter* line of cases" (*id.* at 510).

*Robinson* is not a holding that only a departure from Supreme Court decisions can raise a retroactivity issue. It is a holding that reliance upon lower court decisions in the context of an application of double jeopardy principles may not be entitled to as much weight in the retroactivity calculus as would reasonable reliance upon prior Supreme Court decisions.

The Court has made it plain in other contexts that a question of retroactivity may be raised if a Supreme Court decision overturns a line of lower court authority, even though it does not depart from prior Supreme Court decisions. In *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, for example, this Court declined to give retroactive application to *Rodrigue* v. *Aetna Casualty &*

*Surety Co.*, 395 U.S. 352, where the result would have been to interpose an unanticipated time bar to a personal injury action. The Court reasoned that "*Rodrigue* was not only a case of first impression in this Court * * *, but it also effectively overruled a long line of decisions by the Court of Appeals for the Fifth Circuit" (404 U.S. at 107). When the injury occurred and the action was filed, "these Court of Appeals decisions represented the law governing [the plaintiff's] case" (*ibid.*). He was justified in "rely[ing] on the law as it then was" (*ibid.*). See also *Adams* v. *Illinois*, 405 U.S. 278; *Gosa* v. *Mayden*, 413 U.S. 665.

It is also settled that a court of appeals may determine that one of its own decisions should be given only prospective application. See, *e.g.*, *United States* v. *Gillum*, 463 F. 2d 957 (C.A.D.C.); *United States* v. *Haywood*, 452 F. 2d 1330, 1332 (C.A.D.C.); *Gaither* v. *United States*, 413 F. 2d 1061, 1081–1085 (C.A.D.C.); *United States ex rel. Williams* v. *Twomey*, 467 F. 2d 1248, 1252–1253 (C.A. 7); *United States ex rel. Mayfield* v. *Pate*, 451 F. 2d 1381, 1382–1384 (C.A. 7); *Castro* v. *United States*, 396 F. 2d 345, 349–350 (C.A. 9); *Lamb* v. *Brown*, 456 F. 2d 18, 20 (C.A. 10).

There is, in sum, no reason to think that the rationale of this Court's retroactivity decisions is limited to situations in which this Court has overruled or departed from its own prior decisions. When a court of appeals overrules a long line of its prior cases and applies the evidentiary exclusionary rule with respect to a class of searches that had previously been held valid, it should apply its new rule prospectively or retrospectively in accordance with the principles that have been enunciated in this Court's retroactivity decisions.

While this may lead to different cut-off dates in the various circuits for the application of a new rule, there is nothing anomalous about that result. It simply reflects the fact that what may be reasonable law enforcement conduct in reliance upon the law of one circuit may not be reasonable in a circuit that has held the same conduct to be unlawful.[30] The prospect of a slight lack of symmetry among the courts of appeals is of negligible weight when balanced against the substantial interests of the criminal justice system served by a sensible and pragmatic application of this Court's settled retroactivity principles.[31]

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[30] In her dissenting opinion in *Bowen*, Judge Hufstedler stated that the court's decision in that case should be made *fully* retroactive, because even applying it prospectively from the date of *Almeida-Sanchez* would have "disturbing consequences" (500 F. 2d at 985). Among the "disturbing consequences" she envisioned were different cut-off dates for retroactivity among the various circuits, a result that she thought "would impair or destroy the uniform application of constitutional law" and "turn confusion into chaos" (*id.* at 984, 985). In our view, however, the problem is illusory. There is no need for the exclusionary rule to be applied on a rigidly uniform basis where the circumstances within the several circuits may be substantially different. The focus of the exclusionary rule is upon the deterrent and curative effect it is thought to have on police conduct. Some concededly guilty defendants are the windfall beneficiaries of that deterrent rule, but it is not unfair to a defendant to permit probative evidence to be admitted against him simply because he might have received a windfall benefit had the search taken place at the same time in a different circuit. It would be a far more disturbing consequence, we submit, if a guilty defendant were set free because evidence seized from him by an officer acting in good faith reliance on prior law were excluded at trial even though no deterrent purpose would thereby be served.

[31] There may, of course, be circumstances, not present here, in which a court of appeals decision overruling prior law in the circuit was so clearly foreshadowed by a Supreme Court decision

B. REGARDLESS OF WHETHER *BOWEN* ANNOUNCED A NEW RULE FOR RETROACTIVITY PURPOSES, THE POLICY OF THE EXCLUSIONARY RULE DOES NOT SUPPORT ITS APPLICATION WITH RESPECT TO WARRANTLESS CHECKPOINT SEARCHES CONDUCTED IN THE NINTH CIRCUIT PRIOR TO THAT DECISION

Whether or not *Bowen* can properly be viewed as a sufficient change in the law to present a choice between prospectivity and retroactivity, the policy underlying the evidentiary exclusionary rule would not be ad-

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that the government's continued reliance on the prior law of the circuit might not be reasonable. In that situation, the proper cut-off date might be the date of the Supreme Court's decision. There might also be circumstances in which a court of appeals decision overruling prior cases appears to depart from existing Supreme Court law as well. In that situation, the government might reasonably continue a law enforcement practice even after the court of appeals decision, in reliance upon the Supreme Court's decisions.

That question need not be decided here, however, because the search in this case took place *before* the Ninth Circuit's decision in *Bowen*. There is consequently no need for the Court to consider whether the exclusionary rule should be applied to a post-*Bowen* warrantless checkpoint search. Nor is the issue likely to arise. As we indicated earlier (note 20, *supra*), the Border Patrol modified its checkpoint practices in the Ninth Circuit after the *Bowen* decision. Vehicles were stopped for routine inquiries concerning the citizenship of the occupants, but searches were conducted only upon probable cause or with consent. After the Ninth Circuit held in *United States* v. *Brignoni-Ponce*, 499 F. 2d 1109, certiorari granted, October 15, 1974, No. 74–114, and *United States* v. *Esquer-Rivera*, No. 74–1110, decided July 1, 1974, that routine roving patrol or checkpoint stops without warrants or particularized founded suspicion are unlawful, the Border Patrol began seeking warrants to permit such stops at the checkpoints. Since then, none of the checkpoints in the Ninth Circuit has been operated without a warrant authorizing routine stops for inquiry. The situation has not been wholly satisfactory. We are informed by the Immigration and Naturalization Service that several of the checkpoints have not been operated at all because of an inability to secure warrants for them and that the deterrent effectiveness of the checkpoint system as a whole has been diminished.

vanced by imposing that sanction with respect to official investigative activities undertaken in complete good faith, in reasonable reliance upon apparent statutory authority, and consistent with repeated judicial approval. As this Court observed in *Michigan* v. *Tucker,* No. 73–482, decided June 10, 1974, slip op. 13:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instil in those particular investigating officers, or in their future counterparts, a greater degree of care towards the right of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

These observations apply with full force to the actions of the Border Patrol in conducting checkpoint searches in the Ninth Circuit prior to that court's decision in *Bowen.* Whatever may be the correct resolution of the retroactivity question, it can hardly be doubted that the Border Patrol's checkpoint activities prior to *Bowen* were carried out in good faith pursuant to a considered and reasonable determination that checkpoint searches for aliens could validly be conducted without a warrant under the existing law of the Ninth Circuit. In these circumstances, no substantial deterrent purpose would be served by requiring the exclusion of highly probative evidence derived from such searches prior to the time that the law in that circuit was changed by *Bowen.*

Thus, as a matter either of retroactivity doctrine or of exclusionary rule policy—both of which are governed by substantially similar considerations—evidence procured in a warrantless checkpoint search should not be suppressed if the search was conducted prior to the date of the first controlling judicial determination that such searches in the absence of a warrant are unlawful. The first controlling judicial determination in the Ninth Circuit was the decision in *Bowen*.

## CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded with directions to reinstate the judgment of the district court.

Respectfully submitted.

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HENRY E. PETERSEN,
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DECEMBER 1974.

# APPENDIX

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| IN THE MATTER OF<br><br>CERTAIN CRIMINAL CASES | ORDER<br><br>GENERAL ORDER No. 176 |

Presently there are a large number of criminal cases now pending before this court which involve the question of the impact of the recent Supreme Court decision in Almeida-Sanchez v. United States, 93 S.Ct. 2535 (1973). In accord with this court's policy of expediting and giving priority to criminal cases and with the intent of applying the applicable principles of law in this area on a uniform basis, this court, by vote of all judges present in the district on October 9, 1973, has decided to expedite and consolidate these cases where appropriate.

THEREFORE, IT IS HEREBY ORDERED that the United States Attorney review all cases now pending before this court and make appropriate motions to consolidate those cases which he believes should properly be considered together. The United States Attorney is to consult the clerk of the court and together they are to draw up a proposed calendar consolidating appropriate cases. This calendar should be scheduled before the chief judge for his consideration or reassignment.

By way of guidance, the court would suggest that searches conducted at checkpoints operated by the U. S. Border Patrol may be consolidated together in groups according to the individual checkpoints involved.

It is the intention of this court that this consolidation will facilitate the presentation, by all interested parties, of any pertinent information which might aid the court in its eventual determination. It is anticipated that the parties concerned will make an effort to draw up stipulations concerning relevant facts (i.e., geographical descriptions, statistical data, etc.) so as to narrow any questions of fact to be litigated to the minimum.

IT IS FURTHER ORDERED that a copy of this order be publicly displayed with notice to all attorneys

currently on the appointed list for this district so that any defendant who believes that his case should be considered on a consolidated basis because of a factual situation which is not unique, can make an appropriate motion for transfer to the consolidated calendar.

This order is effective the date hereof.

DATED: October 17, 1973

HOWARD B. TURRENTINE, Judge
United States District Court

GORDON THOMPSON, JR., Judge
United States District Court

DELAND C. NIELSEN, Judge
United States District Court

WILLIAM B. ENRIGHT, Judge
United States District Court

*Judge Edward J. Schwartz was not present in the district on October 9, 1973.